

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DONNA R. RISTEEN,

Civ. No. 09-6020-AA
OPINION AND ORDER

Plaintiff,

v.

WAL-MART STORES, INC., a foreign
business corporation, individually
and dba WAL-MART

Defendant.

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AIKEN, Chief Judge:

Plaintiff Donna Risteen brought suit against defendant Wal-mart Stores, Inc. alleging violations of Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12201, and the Oregon disability discrimination statute, Or. Rev. Stat. § 659A.150. Plaintiff claims defendant discriminated against her based on her actual disability and record of disability, failed to provide her with reasonable accommodations, and failed to participate in the interactive process. Defendant moves for summary judgment on plaintiff's claims and moves to strike certain evidence presented by plaintiff. On April 20, 2010 the court heard telephone oral argument. For the foregoing reasons, defendant's motions are denied.

BACKGROUND

Plaintiff is an adult female with severe dyslexia who is essentially unable to read or write. In February 2002, she applied for a cashier position at defendant's Lancaster Road store in Salem, Oregon. Because she could not read or write, her daughter Tammy Goodwin, also a Wal-Mart employee, filled out her application form and read the job description and other written materials to her. At the time she was hired, plaintiff did not ask for an accommodation for her dyslexia. The parties dispute whether or not plaintiff told defendant of her dyslexia at that

time.

Plaintiff began working as a cashier on March 5, 2002. Shortly thereafter, plaintiff informed defendant that she was having difficulty reading credit card numbers and receipts. Within weeks, she was transferred to the position of people greeter. In that position, plaintiff again had difficulty with some of the job duties, such as verifying receipts of customers leaving the store. In July 2002, she was transferred to the women's clothing department to work as a sales associate. In July 2003, she was transferred to the men's clothing department, where she remained until June 19, 2007.

In February 2004, plaintiff signed an acknowledgment of the sales associate job description which listed the position's essential functions. Some of the essential functions included visual recognition of labels, prices, and signs. To meet these requirements in light of her dyslexia, plaintiff memorized commonly used words and phrases, such as "sale," and asked her supervisor and coworkers to give verbal instructions when possible or to assist her with reading. On each of her annual evaluations, plaintiff's supervisor Diann Wake gave her an overall rating of "meets expectations." Areas for improvement noted on plaintiff's most recent evaluations included "learn[ing] how to cut fabric and dip fish," "finish[ing] each job in a timely manner," "spend[ing] more time in the dept.," "learn[ing] how to do

claims," and "keep[ing] the dept. cleaner." Declaration of Sharon Stevens (Stevens Decl.), Ex. 14, p. 1; Ex. 15, p. 1.

Beginning June 4, 2007, Wake began leaving lists of specific duties Wake wanted plaintiff to accomplish on a particular day. The notes were written in Wake's cursive handwriting. Because plaintiff had difficulty reading them, she asked another employee to read them to her. Plaintiff did not ask Wake to stop giving her notes because "she didn't want to get in trouble."

Declaration of Donna Risteen (Risteen Decl.), p. 6. But when Wake asked plaintiff if she would prefer not to receive notes, plaintiff responded, "what do you think, Diann?" Risteen Decl., p. 6., Stevens Decl., Ex. 1, p. 18. Apparently, in the past plaintiff had asked Wake not to leave her notes.

Also in early June 2007, plaintiff was told by store managers that she must fill in occasionally as a cashier when the store was busy, in addition to performing her sales associate duties. Plaintiff told the store managers and Wake that she was unable to cashier because of her dyslexia. Plaintiff was advised by Cindy Russ, store co-manager, to bring in a doctor's note verifying her disability.

On June 10, 2007, plaintiff provided a medical release form so that defendant could contact her doctor, Richard Eikren, M.D., regarding her dyslexia. At the same time, she completed a written request for reasonable accommodation to be relieved of

cashier duties and to receive no written instructions. Defendant denied plaintiff's request. Plaintiff appealed the denial and took a 30-day leave of absence beginning June 19. Prior to her 30-day leave, store manager Alex Frolov told plaintiff she was qualified for the position of cart/courtesy associate in light of her requested accommodations. This position had a lower hourly wage than the sales associate position and offered fewer hours.

On July 2, 2007, defendant denied plaintiff's appeal in a letter signed by Deidre Davis, Director of ADA Services. Davis stated that plaintiff was "either not a qualified individual with a disability as defined by the ADA" or that her "request was unreasonable." Stevens Decl., Ex. 25, p. 1.

On July 21, Mr. Frolov sent plaintiff a letter directing her to return to work by July 30, or face termination. Frolov advised plaintiff that she needed to "take the position that meets your criteria per our conversation." Stevens Decl., Ex. 27, p. 1. Plaintiff returned to work on July 30. She was asked to sign the job description for the cart/courtesy associate position. She refused and was officially terminated on August 3, 2007.

STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party

is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The materiality of a fact is determined by the substantive law on the issue. T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). The authenticity of a dispute is determined by whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. Id. at 324.

Special rules of construction apply to evaluating summary judgment motions: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. T.W. Elec., 809 F.2d at 630.

DISCUSSION

Plaintiff brought several claims against defendant under the ADA and state disability law including disability discrimination, failure to provide reasonable accommodation, failure to engage in

the interactive process, harassment, and punitive damages.¹ Plaintiff concedes that she cannot prevail on her claims of harassment, discrimination based on being "regarded as" having a disability, and punitive damages. Defendant moves for summary judgment on the remaining claims.²

A. Disability discrimination

Defendant argues that plaintiff fails to establish a prima facie case for disability discrimination. To establish a prima facie case under Title I of the ADA, plaintiff must show that: 1) she is disabled within the meaning of the ADA; 2) she is able to perform the essential functions of the job with or without reasonable accommodation; and 3) she suffered an adverse employment decision because of her disability. 42 U.S.C. §§ 12112(a), (b) (5) (A), 12111(8); Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1246 (9th Cir. 1999). The standard for establishing a prima facie case of disability discrimination under Oregon law is identical. Snead v. Metropolitan Property & Cas. Ins. Co., 237 F.3d 1080, 1087 (9th Cir. 2001).

In addition, the burden shifting analysis set forth in

¹In her response to defendant's motion, plaintiff also raises a claim of retaliation. However, because that claim was not asserted in plaintiff's complaint, I do not address it.

²Defendant also moves to strike declarations presented by plaintiff, but because I do not consider the challenged statements in my analysis, the motion is moot.

McDonnell Douglas Corp. v. Green, 411 F.3d 792, 802-805 (1973), applies to both federal and state claims. Once plaintiff establishes a prima facie case, the burden shifts to defendant to provide a non-discriminatory reason for the adverse employment action. If defendant does so, plaintiff bears the burden of showing defendant's reason was pretext for discrimination. To survive summary judgment, plaintiff must raise a material question of fact that defendant's proffered reason was pretextual.

1. Actual or record of disability

To satisfy the first step in her prima facie case for either claim, plaintiff must show that she is actually disabled, or has a record of being disabled, according to the ADA and Oregon law. Nunes, 164 F.3d at 1246. Defendant argues that plaintiff is not disabled within the meaning of the ADA, because she has not raised a genuine issue of material fact that her dyslexia is a "physical or mental impairment" that "substantially limits one or more major life activities." 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g)(1).

The Ninth Circuit has recognized dyslexia and other learning disabilities as qualifying impairments under the ADA. See Vinson v. Thomas, 288 F.3d 1145, 1152 (9th Cir. 2002); Wong v. Regents of Univ. of Calif., 410 F.3d 1052, 1069 (9th Cir. 2005). The Ninth Circuit has also held that reading is a major life

activity. Head v. Glacier Nw., Inc., 413 F.3d 1053, 1061 (9th Cir. 2005). Further, plaintiff presents evidence sufficient to show that genuine issues of fact exist as to whether she has severe dyslexia and whether her dyslexia substantially limits the major life activity of reading.

To survive summary judgment, plaintiff need not provide medical or comparative evidence to establish a genuine issue of material fact regarding the impairment of a major life activity. Head, 413 F.3d at 1058. Rather, plaintiff's testimony may suffice to establish genuine issue of material fact. Id. Plaintiff clearly surpasses this burden. Not only does plaintiff provide her own testimony explaining that her dyslexia substantially impairs her ability to read, but she also provides declarations of family members, medical documentation, and a letter from her doctor. Risteen Decl., p. 2, Declaration of Danny Risteen, pp. 1-2, Declaration of Tammy Goodwin, p. 1, Stevens Decl., Ex. 23, pp. 1-2; Ex. 31, p.1. This evidence presents a genuine issue of material fact as to whether plaintiff is disabled within the meaning of the ADA and whether plaintiff has a record of a disability. Snead 237 F.3d at 1089 (9th Cir. 2001) ("physicians' notes and various letters in the record . . . create at least a genuine issue of fact regarding a record of [the plaintiff's] impairment.").

2. Able to perform essential functions of the job.

Defendant argues plaintiff cannot establish that she was "otherwise qualified" to perform the essential functions of the job with or without reasonable accommodation. See 42 U.S.C. § 12111(8). Defendant argues that because she cannot read or write, plaintiff does not meet her burden of showing that she is able to perform the essential functions of a sales associate.

I find that plaintiff raises genuine issue of material fact regarding her ability to perform the essential functions of the sales associate position with or without accommodation. The essential functions of a job are "the fundamental job duties of the employment position . . . not including the marginal functions of the position." Bates v. United Parcel Serv., Inc., 511 F.3d 974, 988 (9th Cir. 2007). When an employer challenges a plaintiff's claim that he or she can perform the essential functions of the job, the employer bears the burden of production to come forward with evidence of those essential functions. Id. at 991.

Here, defendant presents the sales associate job description and the essential job functions matrix form signed by plaintiff, which indicate that visual recognition and basic reading and writing are essential functions of the sales associate position. While a written job description is evidence of essential job functions, it is not conclusive. Rohr v. Salt River Project Agri. Improvement & Power Dist., 555 F.3d 850, 864 (9th Cir.

2009). An employer may not "turn every condition of employment which it elects to adopt into a job function, let alone an essential job function, merely by including it in a job description." Cripe v. City of San Jose, 261 F.3d 877,887 (9th Cir. 2001) When there is a conflict in the evidence over the essential functions of a position, there is a factual dispute notwithstanding the job description an employer has prepared. Id. at 888-89.

In response, plaintiff presents competing evidence that she could perform the essential functions of the sales associate job, particularly with some accommodation. Defendant accommodated plaintiff in the past when store managers transferred plaintiff from the cashier position to people greeter and then to a sales associate position when she had difficulty reading. Plaintiff worked as a sales associate in men's clothing for four years, and in all of her written evaluations she received an overall rating of "meets expectations." None of the comments under areas for improvement mentioned that plaintiff could not complete tasks because she could not read or write.

Further, the record shows that plaintiff was removed from her sales associate position because she could not occasionally fill in as cashier. Defendant does not argue that filling in occasionally as cashier is an essential function of the sales associate job. Instead, plaintiff presents evidence sufficient

to raise a genuine issue of material fact that she was otherwise qualified to perform the essential functions of the sales associate position with or without accommodation.

3. Adverse employment action because of disability

Defendant argues that regardless of whether plaintiff can show she is disabled or qualified for the sales associate position, she does not present evidence that she experienced an adverse employment action because of her disability.

Plaintiff responds that she was offered the cart/courtesy position because defendant decided plaintiff was unable to perform the sales associate job due to her inability to read and write. Plaintiff contends that the cart/courtesy associate position was a demotion, because it paid lower wages and offered fewer hours.

The Ninth Circuit recognizes demotion as adverse employment action. See Steiner v. Showboat Operation Co., 25 F.3d 1459, 1465 (9th Cir. 1997); Bouman v. Block, 940 F.2d 1211, 1229 (9th Cir. 1991). Plaintiff's evidence is sufficient to raise genuine issue of material fact that she was demoted and ultimately terminated because she failed to accept that demotion. Further, construing all inferences in favor of plaintiff, an issue of material fact exists as to whether she was demoted and eventually terminated because of her dyslexia after defendant denied her request to be excused from cashier duties that required reading abilities.

4. Legitimate non-discriminatory reasons and pretext

Defendant argues that even if plaintiff can establish a prima facie case for disability discrimination, she cannot show that defendant's legitimate non-discriminatory reasons for transferring her to the cart/courtesy position and subsequent termination were pretext for discrimination. Defendant maintains that plaintiff was separated from her employment when she refused to sign the job description for cart/courtesy associate. Plaintiff responds that defendant asked her to sign the job description before she fully understood the job, and that she was demoted because of her disability.

At summary judgment, plaintiff has the burden of persuasion to demonstrate that defendant's proffered reason was not the true or complete reason for plaintiff's adverse employment action. Snead, 237 F.3d at 1903. Plaintiff may present evidence that persuades the court that a discriminatory motive is more likely the reason for the employer's actions or show indirectly that the employer's proffered reason is unworthy of credence. Id. at 1093-94; Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248, 256 (1981).

Defendant claims that plaintiff was reassigned to the cart/courtesy position because she was not performing her job adequately and not meeting goals set forth in her annual evaluations even though defendant did not reassign plaintiff

until she requested an accommodation. Defendant contends that plaintiff was terminated because she failed to accept the cart/courtesy position after her leave of absence and refused to sign the job description. Defendant told plaintiff, in a letter dated July 21, 2007 that she must sign the job description and accept the cart/courtesy position or lose her employment with Wal-Mart. Defendant contends that plaintiff's refusal provided legitimate non-discriminatory grounds for her termination.

Plaintiff argues that defendant's proffered reason for transferring her to the cart/courtesy position and her subsequent termination were pretext for discrimination based on her dyslexia, given that she met defendant's expectations during the four years she had worked as sales associate and was only removed after she requested accommodation for her inability to read. In her deposition and declaration, plaintiff asserts that she observed signs that her supervisor and the managers were trying to remove her from the men's department. For example, Wake began leaving written instruction for plaintiff, despite plaintiff's previous objections and Wake's knowledge that plaintiff had difficulty reading.

I find that the circumstances surrounding plaintiff's demotion from the sales associate position raise an issue of material fact. Plaintiff maintains that not all other sales associates were required to fill in as cashier, and evidence on

record, including a declaration from plaintiff's co-worker, supports this assertion. Declaration of Linda Amaral, p. 2.

Further, defendant's argument that plaintiff was not performing adequately as a sales associate is not sufficiently supported in the record. Defendant argues that plaintiff had not learned how to "cut fabric and dip fish" which was listed on her evaluation form as an area for improvement. However, plaintiff's supervisor testified in deposition that these tasks were not really requirements of the sales associate position. She explained, "[i]t wasn't pushed that much. It was just something that the store manager come (sic) up with, but it wasn't pushed for everybody to do it." Stevens Decl., Ex. 3, p. 20.

In sum, plaintiff presents genuine issues of material fact that she has an actual and record of a disability, that she is otherwise qualified and can perform the essential functions of the sales associate position with or without accommodation, and that she suffered an adverse employment action because of her disability. The record also presents sufficient evidence to raise a question of fact that defendant's demotion and termination of plaintiff were motivated by discriminatory animus. Summary judgment on the claim of disability discrimination is denied.

B. Failure to Accommodate

Defendant next moves for summary judgment on plaintiff's

claim that defendant failed to reasonably accommodate her disability as required by the ADA and Oregon law. An employer violates the ADA by "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the employer." 42 U.S.C. § 12112(2)(5)(A). Failure to accommodate is also a violation of Oregon disability law. Or. Rev. Stat. § 659A.112.

Defendant first argues that it had no duty to accommodate plaintiff because she was not an otherwise qualified individual with a disability. Because plaintiff raises genuine issues of material fact regarding her status as an otherwise qualified individual with a disability, defendant's first argument for summary judgment on this claim fails. Defendant next argues that it did not fail to accommodate plaintiff, because it engaged in the interactive process with plaintiff and no reasonable accommodation for plaintiff existed in the sales associate position.

1. Interactive Process

Defendant argues that plaintiff cannot show that it failed to engage in the interactive process. The EEOC regulations implementing the ADA state that it may be necessary for an employer "to initiate an informal, interactive process with the

qualified individual with a disability" to determine an appropriate reasonable accommodation. 29 C.F.R. § 1630.2(o)(3).

The Ninth Circuit has held that the interactive process is mandatory for an employer when a disabled employee requests an accommodation. Zivkovic v. S. Calif. Edison Co., 302 F.3d 1080, 1089 (9th Cir. 2002). The interactive process requires: (1) direct communication between the employer and employee to explore in good faith the possible accommodations; (2) consideration of the employee's request; and (3) accommodation that is reasonable and effective. Id.

Defendant argues that it initiated the interactive process with plaintiff when she requested accommodation that she not be required to cashier. Then, according to defendant, store managers searched for a position that would be suitable for plaintiff given her limitation in reading and writing and offered plaintiff the cart/courtesy position.

However, plaintiff presents sufficient opposing evidence that defendant did not engage in an interactive process. Plaintiff argues that when she made a formal request for reasonable accommodation, i.e. to be relieved from cashier duties, defendant did not engage in direct communication with her to explore possible accommodations. Instead, plaintiff contends that defendant told her she could take the cart/courtesy job or be terminated from Wal-mart. Plaintiff's assertion is supported

by the letter from defendant sent to plaintiff just before she returned to work in late July 2007.

Plaintiff's evidence creates an issue of fact as to whether defendant in good faith engaged plaintiff in the interactive process as required by the ADA.

2. Accommodation

Finally, defendant argues that plaintiff cannot meet her burden of showing that an accommodation was possible for her sales associate position. Defendant argues that store managers had no way of knowing how to accommodate plaintiff's dyslexia in her position of sales associate and they were not required to speculate on an appropriate accommodation. However, evidence on the record supports plaintiff's position that she suggested possible accommodations. For example, plaintiff had discussions with her supervisor and the store managers about her request to be relieved of the duty to occasionally cashier. Further, her formal accommodation request presented defendant with two possible accommodations: no cashier duties and no written instructions from Wake. Plaintiff provides sufficient evidence that she presented defendant with possible accommodations for her dyslexia in the sales associate position, and that defendant failed to consider them. Moreover, plaintiff worked in the sales associate position for four years prior, meeting the expectations of defendant.

Accordingly, defendant's motion for summary judgment on plaintiff's claims of failure to reasonably accommodate her disability and failure to engage in the interactive process are denied.

CONCLUSION

For the above stated reasons, defendant's motion for summary judgment (doc. 21) and motion to strike (doc. 45) are denied.
IT IS SO ORDERED.

Dated this 30 day of April, 2010.

A handwritten signature in cursive script, appearing to read "Ann Aiken", is written over a horizontal line.

Ann Aiken
United State District Judge